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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NO. 81-2208

INTERCOLLEGIATE (BIG TEN) CONFERENCE OF FACULTY REPRESENTATIVES, INDIANA UNIVERSITY, UNIVERSITY OF IOWA, UNIVERSITY OF MICHIGAN, MICHIGAN STATE UNIVERSITY, UNIVERSITY OF MINNESOTA, NORTHWESTERN UNIVERSITY, OHIO STATE UNIVERSITY, PURDUE UNIVERSITY and UNIVERSITY OF WISCONSIN,

Petitioners,

vs.

DAVID C. WILSON,

Respondent.

BRIEF IN OPPOSITION OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The Respondent, David C. Wilson, respectfully prays that a Writ of Certiorari not be issued to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on January 26, 1982, and for costs and expenses.

QUESTION PRESENTED FOR REVIEW

1. Whether an order remanding a removed case to State Court is reviewable by appeal or otherwise.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 668 F.2d 962.(A-1) The opinion of the United States District Court for the Central District of Illinois is reported at 513 F.Supp. 1062.

JURISDICTION

This Court does not have jurisdiction to review a remand to State Court under 28 U.S.C. § 1447(c and d). (A-9)

STATUTES CONSTRUED

28 U.S.C. § 1446(b)

28 U.S.C. § 1447(c)(d) (1976)

The text of these Statutes appears at A-9.

STATEMENT OF THE CASE

While the only basis for review asserted here violates the Section 1447(d), prohibition on review of decisions remanding cases to State Court, for some reason Petitioner has felt the need to make assertions about the underlying facts of the case, as if they bore upon the removal issue, and has done so, recklessly, at a minimum.

It is necessary, then, to respond to the misstatements in Petitioner's Statement of the Case, although obviously irrelevant to the issue upon which Petitioner seeks a new form of review.

Respondent Wilson now plays professionally. However, he did far more academically than attend "some classes" at Illinois. He is an upper Junior who is in excellent standing for readmission.

He never suffered from ". . . a lack of academic progress . . ." at his Junior College. His progress was fully accredited and transferable anywhere. Only an obscure

rule honored by the Conference in its breach (discovery shows 116 waivers of the rule in 119 petitions within the last 4 years), required a perfunctory petition for its waiver upon Wilson entering a Big Ten School.

Petitioner conveniently forgets that its appropriate Eligibility Committee *did* waive the rule preventing immediate eligibility. Another committee (the trial Court found) violated the Conference rules and purported to improperly remove the waiver once granted.

This case is one resolved by reference to Petitioner's own rules and the rights they have created in Respondent, as much as by normal statutory or Constitutional sources of right.

Central to the issue on review has been the concession below by Petitioner that the cause was initially removable. [See Petitioner's original Petition for Removal, paragraph 5, (A-12)].

He asserts error in the Seventh Circuit opinion finding no "brand new lawsuit" inherent in certain amendments clarifying the theory of previously made constitutional and statutory Federal claims and adding only State theories. He further asserts that such error (if made) is reviewable here.

SUMMARY OF ARGUMENT

In briefest summary, the Petitioner contends that this Court should review this cause, ignoring the provision against such review, merely because in remanding the cause to State Court the Seventh Circuit failed to chant the correct incantation and paraphrased it instead. Not since the distinction between trespass and case has so technical an argument been made with so straight a face.

An order remanding a removed case to State Court is not reviewable by appeal or otherwise. Section 1447(d) of the

Judicial Code, 28 U.S.C. § 1447(d) (1976), provides that an order remanding a case to the State Court from which it was removed is not reviewable on appeal or otherwise. The purpose of this statute is to bar the type of review requested here by Petitioner, "to prevent the additional delay which a removing party may achieve by seeking appellate reconsideration of an order of remand."

The Court of Appeals remanded the case to State Court for jurisdictional reasons and therefore, that decision is not reviewable by appeal or otherwise. This Court in *Thermtron Products, Inc.* v. *Hermansdorfer*, infra, held that Section 1447(d) bars review of all remand orders issued pursuant to 28 U.S.C. § 1447(c) whether erroneous or not and whether review is sought by appeal or by extraordinary writ. Section 1447(c) provides that if it "appears that a case was removed improvidently and without jurisdiction, the District Court shall remand the case." The Court of Appeals remanded this case for reasons clearly within the realm of Section 1447(c) and, therefore, review is prohibited by Section 1447(d).

The Court of Appeals based its remand order on grounds that the case was improvidently removed and, therefore, that decision is not reviewable. The Court of Appeals in *Wilson* based removal on the grounds that petitioner failed to remove within the 30 day statutory time period. Various courts have held that failure to comply with the statutory time requirement for removal was the sort of defect which makes a case "improvidently" removed. Even though the Court of Appeals did not specifically use the magic words of Section 1447(c), it is apparent that at the time of the remand order the Court held the case was to be remanded under that section; thus the unavoidable inference that it felt the case was removed "improvidently and without jurisdiction." Such a holding is well within Section 1447(c) and, therefore, not reviewable on appeal or otherwise.

The decision of the Court of Appeals accords with the decisions of this Court and lower federal courts. Petitioner

falsely and fallaciously contends that the decision of the Court of Appeals in *Wilson* is contrary to this Court's decision in *Thermtron Products, Inc.* v. *Hermansdorfer*, infra; however, this is fallacious. The Wilson remand, on jurisdictional grounds, is clearly in accord with the decisions of this Court.

REASONS FOR NOT GRANTING THE PETITION

I. AN ORDER REMANDING A REMOVED CASE TO STATE COURT IS NOT REVIEWABLE BY APPEAL OR OTHERWISE.

Section 1447(d) of the Judicial Code, 28 U.S.C. § 1447(d) (1976), provides that an order remanding a case to the State Court from which it was removed is not reviewable on appeal or otherwise. This statute constitutes a complete bar to the review of remand orders.

Mr. Justice Rehnquist, in his dissent, to *Thermtron Products, Inc.* v. *Hermansdorfer* 423 U.S. 336, 46 L.Ed.2d 542, 96 S.Ct. 584 (1976), outlined Congress' purpose in barring review of remand orders.

> "Congress' purpose in barring review of all remand orders has always been very clear—to prevent the additional delay which a removing party may achieve by seeking appellate reconsideration of an order of remand. The removal jurisdiction works a significant interference in the conduct of litigation commenced in state court . . . If the party opposing a remand order may obtain review to litigate whether the order was properly pursuant to the statute, his ability to delay and to frustrate justice is wide ranging indeed."

The review sought in this case is exactly what Congress intended to bar by the creation of Section 1447(d). In *Wilson* the Appellate Court, after full discussion of the issues, determined that Wilson's case should not have been removed to Federal Court and therefore remanded it. By a plain reading of the statute this decision is not

reviewable. Congress has made all judgments "remanding a cause to the State Court final and conclusive." In re *Pennsylvania Co.*, 137 U.S. 451, 454, 11 S.Ct. 141, 142, 34 L.Ed. 738 (1890), *United States* v. *Rice*, 327 U.S. 742 at 751, 66 S.Ct. 835 at 839, 90 L.Ed. 982.

This Court held in *Thermtron Products, Inc.* v. *Hermansdorfer*, 423 U.S. 336, 343 46 L.Ed. 542 (1976), where the District Court ordered a remand because of its crowded docket, that Section 1447(d) did not bar review of remand orders "issued on grounds not authorized by Section 1447(c). In so doing, this Court "reemphasized the rule that Section 1447(c) remands are not reviewable." *Gravitt* v. *Southwestern Bell Telephone Company*, 431 U.S. 975, 97 S.Ct. 2941 (1977). This exception grafted onto the rule by *Thermtron* has no application to Wilson's case because in *Wilson* the Court of Appeals remanded the case to the State Court on ". . . jurisdictional . . ." (A-8) grounds squarely within Section 1447(c).

A. THE COURT OF APPEALS REMANDED THE CASE TO STATE COURT FOR JURISDICTIONAL REASONS AND, THEREFORE, THAT DECISION IS NOT REVIEWABLE BY APPEAL OR OTHERWISE.

Section 1447(d) of the Judicial Code, 28 U.S.C. Section 1447(d) (1976), prohibits review of all remand orders issued pursuant to Section 1447(c) *whether erroneous or not* and whether review is sought by appeal or by extraordinary writ. This has been the established rule under Section 1447(d) and its predecessor stretching back to 1887. (Emphasis added) *Thermtron Products, Inc.* v. *Hermansdorfer*, supra, 423 U.S. at 343. See e.g., In re *Pennsylvania Co.*, 137 U.S. 451, 11 S.Ct. 141, 34 L.Ed. 738 (1890); *Ex Parte Matthew Addy S.S. Co.*, 256 U.S. 417, 41 S.Ct. 508, 65 L.Ed. 1027 (1921); *Employers Reinsurance Corp.* v. *Bryant*, 299 U.S. 374, 57 S.Ct. 22 81 L.Ed. 289 (1937); *United States* v. *Rice*, 327 U.S. 742, 66 S.Ct. 835, 90 L.Ed. 982 (1946). Section 1447(c) provides in part:

> "If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the District Court shall remand the case, and may order the payment of just costs."

Therefore, if a Court purports to remand a case on the ground that it was removed "improvidently and without jurisdiction," that order is not subject to challenge by appeal or otherwise. *Thermtron Products, Inc.*, v. *Hermansdorfer*, supra, 423 U.S. at 343; *Gravitt* v. *Southwestern Bell Telephone*, 430 U.S. 723, 52 L.Ed.2d 1 (1977); *Volvo Corp.* v. *Schwarzer*, 429 U.S. 1331, 50 L.Ed. 273, 97 S.Ct. 284 (1976).

The Court of Appeals remanded Respondent's suit to State Court on the basis that it was removed without jurisdiction. Petitioner admits, on pages 7 and 16 (A-10, 11) of its Petition for Writ of Certiorari, that the Court of Appeals reversed the District Court and remanded the case to State Court on the "basis of what they considered jurisdictional grounds." Petitioner states that the Court of Appeals has concluded that the 30 day rule of Section 1446(b), and its purposes "are jurisdictional." Petitioner's contention is that while the District Court remanded the case on jurisdictional grounds, its grounds for deciding this were erroneous.

Petitioner is asking this Court to review the reasoning behind the Appellate Court's decision that removal was without jurisdiction. However, this same argument was rejected by this Court in *Gravitt* v. *Southwestern Bell Telephone Company*, 430 U.S. 723, 52 L.Ed. 2d 1 (1977). In *Gravitt*, the Court of Appeals for the Fifth Circuit, by mandamus, ordered the District Court to vacate its remand order because the latter had "employed erroneous principles in concluding that it was without jurisdiction." Citing *Thermtron*, this Court held that when a remand has been ordered on the grounds stated in Section 1447(c), Section 1447(d) unmistakably commands that the order "remanding a case to the State Court from which it was removed is not reviewable on appeal or otherwise . . ."

Likewise, here, the order of the Seventh Circuit is not reviewable even were its finding of lack of jurisdiction based on erroneous reasoning.

Petitioner is asking this Court to review the grounds that the Court used in remanding a case under Section 1447(c) even though this Court has already stated,

> "There is no doubt that in order to prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues, *United States* v. *Rice* 327 U.S. 742 at 751, 66 S.Ct. 835 at 838, 90 L.Ed. 982, Congress immunized from all forms of appellate review *any remand order* (emphasis added) issued on the grounds specified in Section 1447(c), whether or not that order might be deemed erroneous by an appellate court. *Thermtron Products, Inc.* supra, 423 U.S. at 351.

The Court of Appeals stated on page 8 of its opinion (A-8) that the District Court's judgment is vacated "for want of federal jurisdiction." This indicates that the reason for its remand of the case back to State Court was jurisdictional. Its discussion of policy "concerns" was only an attempt to outline its reasons for determining there was no jurisdiction, which it is not even required to do. *Thermtron Products, Inc.* v. *Hermansdorfer*, supra, 423 U.S. at 357. It is at most dicta.

To allow review of the scholarly exposition which the Court used to explain jurisdiction rule 1447(c) would effectively dispense with the Section 1447(d) bar to review; it would make the Section 1447(d) bar on review contingent on the use of the "magic words" of Section 1447(c). Surely this could not be the intent of Congress when enacting this statute.

The purpose of Section 1447(d) is very clearly to prevent the additional delay which a removing party might achieve by seeking appellate reconsideration of an order of removal. *Thermtron Products, Inc.* v. *Hermansdorfer*, supra, 423 U.S. at 354. Allowing review here would under-

mine the purpose of the statute and would soon render meaningless Congress' express, and heretofore, fully effective, directive prohibiting this review and mandating quick, effective justice in State Courts.

For the reasons stated herein this Court should not grant petitioner's request for a writ of certiorari to review the Court of Appeals' order remanding this case to State Court.

B. THE COURT OF APPEALS BASED ITS REMAND ORDER ON GROUNDS THAT THE CASE WAS IMPROVIDENTLY REMOVED AND, THEREFORE, THAT DECISION IS NOT REVIEWABLE.

The Court of Appeals in *Wilson* stated on page 4 (A-4) of its opinion that the original case was removable but that Petitioner failed to remove within the 30 day statutory time period and the action did not revive because the amendments were insubstantial. Many courts have held that failure to comply with the statutory time requirement for removal is the sort of defect which makes a case "improvidently" removed.

In *London* v. *U.S. Fire Ins. Co.*, 531 F.2d 257 (C.A.Fla., 1976), the Court held that failure to comply with the statutory time requirement for removal of a case was the sort of defect which the District Court was entitled to consider and, by reason thereof, the case was "improvidently" removed. *Friedrich* v. *Whittaker Corp.*, 467 F. Supp. 1012 (D.C.Tex. 1979), held that removal is "improvident," requiring remand to State Court if the 30 day filing requirement is not complied with. *Typh. Inc.* v. *Typhoon Fence of Pennsylvania, Inc.*, D.C.Pa. (1978), 461 F.Supp. 994, held that if an action were removable at any time the Complaint was filed and defendants failed to file the removal petition within 30 day period, the Court may, solely on that ground, remand to State Court.

While the Court of Appeals did not specifically use the term "improvidently removed," it did state that it

remanded because the Defendant did not file within the 30 day time period. In re *Weaver*, 610 F.2d 335 (1980), held that even though the specific language of Section 1447(c) was not used, where the District Court Judge believed the case was not removable and concluded that removal of State Court action, if it had been proper at all, was no longer available after defendants had sought dissolution of injunction in State Court, the logical inference was that the District Court Judge felt jurisdiction was lacking; thus the Court of Appeals was precluded from reviewing the removal order. In *Weaver*, the District Court did not refer to Section 1447(c), nor did it mention the phrase "removed improvidently and without jurisdiction." It merely concluded that removal was no longer available. Such a ruling is not within the specific enumerated grounds of Section 1447(c). Citing in re *Merrimack Mutual Fire Insurance Company*, 587 F.2d 642 (5thCir., 1978) the Court stated that "following *Gravitt*, *Thermtron* was intended to be strictly limited to those cases in which a District Court has clearly not relied upon Section 1447(c) in ordering the remand.

Even though the Court of Appeals did not use the specific language of Section 1447(c) it is apparent that at the time of the remand order, the Court believed the case was not removable, thus leading to the logical inference that it felt the case was removed "improvidently and without jurisdiction." Such a holding is well within the guidelines of Section 1447(c) and therefore, that holding is not reviewable on appeal or otherwise. *Thermtron Products, Inc.* v. *Hermansdorfer* and Gravitt v. *Southwestern Bell Telephone Co.*, supra.This Court should not grant petitioner's petition for writ of certiorari, to review this holding. To allow review here would make the Section 1447(d) bar contingent on the use of the "magic words" of Section 1447(c) and this surely was not the intention of Congress.

II. THE DECISION OF THE COURT OF APPEALS IS IN ACCORDANCE WITH THE DECISIONS OF THIS COURT AND OTHER LOWER FEDERAL COURTS.

Petitioner contends that the decision of the Court of Appeals here is contrary to this Court's decision in *Thermtron*, supra. However, that is not the case. The Court of Appeals based its decision on its belief that the case had been removed without jurisdiction. Petitioner contends that this Court's decision in *Thermtron* stands for the proposition that no discretionary factors can be looked at when deciding whether to remand. However, this Court in *Gravitt*, supra, held that a decision to remand cannot be reviewed on the basis that the factors, used in deciding whether there was jurisdiction, were erroneous. The decision in *Thermtron*, is limited to the specific instance where the Court expressly states grounds for remanding that are clearly outside the realm of Section 1447(c).

Moreover, the language of the opinion seized upon by Petitioner is ". . . *If* the only interests at stake in this litigation *were* the private interests of the parties, we *might* agree . . . that the case was improperly removed." (emphasis added)

"*Might*" is not "would."

Petitioner's abysmal failure to comprehend the classic subjunctive condition-contrary-to-fact construction argues more for the inadequacy of Petitioner's Latin and English rhetorical background than for an interpretation that the Appellate Court's remarks here are more than classic *obiter dicta*, and that the usual rules of construction on appeal apply: the Court will read a decision in accordance with a valid rule which will sustain it.

The mere inclusion of the word "improvidently" harmonizes the opinion and the statute with the justice of the Court's decision.

The Court of Appeals in *Wilson* based its decision to remand on grounds expressly stated in Section 1447(c), that is, on jurisdictional grounds. This is clearly in accordance with this Court's decisions in *Thermtron* and *Gravitt*, supra.

The decision of the Court of Appeals is not contrary to any decisions of this Court or of other lower Federal Courts. Therefore, there is no reason to disturb the ruling of the Court of Appeals and to delay Respondent any longer in proceeding with the prosecution of his lawsuit.

CONCLUSION

For the reasons stated herein, a writ of certiorari should not be issued to review the judgment and opinion of the Seventh Circuit Court of Appeals and an order for fees and costs because of the clear violation of 1447(d) in the taking of this review, under Supreme Court Rule 50(1).

Respectfully submitted,

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